SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

MOTION FILED

MAR 8 1972

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

MOTION OF THE HOMART DEVELOPMENT CO. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE HOMART DEVELOPMENT CO. AS AMICUS CURIAE

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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tive was available for the effective expression of propaganda to the town's residents. In *Logan Valley* the union's publicity, having been directed to prospective customers of a specific store, could not reasonably effectively have been made other than at the store's location at a time when those customers could receive and be influenced by the union's message. Similarly, in both *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (CA 2, 1968), and *In re Hoffman*, 64 Cal. 2d 845 (1967), the rights granted anti-war groups to picket the premises involved in those cases are consistent with the judgment that the object of the demonstrations,—*i.e.*, to reach and influence Vietnam-bound servicemen—could be effectively achieved only at the time and place where those servicemen were assembled.[5]

In accord with these decisions granting the right to propagandize on private property, those other courts which have refused to permit such conduct have done so in factual contexts in which there existed reasonably effective alternative means to the use of such private property. Thus, for example, in *Babcock & Wilcox Co.*, this Court emphasized both the existence of such reasonable alternatives and the consequent absence of necessity to use private property in order to achieve effective communication of the views sought to be expressed. And the application of this proposed rule to *Taggart* v. *Weinacker's*, 397 U.S.

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[5] Although the rule formulated here would, as applied to *Wolin* and *Hoffman*, yield consistent and national results, it remains true that they may be interpreted to differ from *Logan Valley* in that they involve not private centers designed to afford private commercial benefit but privately owned transport facilities designed to serve a public need otherwise served by the State. As such, they may perhaps legitimately be viewed as involving a "functional equivalent" to public property whereas the commercial activities at the Logan Valley Plaza could not appropriately result in the same description applied there. Property on which substitute municipal or State functions are performed may be viewed to be outside the reach of the rule of law proposed herein. Such an exclusion would not, of course, apply to *Central Hardware*, *Homart* or the instant case.

223, similarly justifies the state court's decision there, undisturbed by this Court, finding the union's picketing of private retail property to constitute a trespass rather than protected First Amendment activity; for in *Taggart* the union's use of private property was unnecessary since the availability of the adjoining *public* sidewalks gave the union a wholly effective alternative locus from which to reach the very persons with whom it sought to communicate from the private parking lot.

The fact that the rule proposed here explains and harmonizes the results reached in each of these cases while striking a reasonable balance between the conflicting Constitutional guarantees involved argues strongly for its express adoption by this Court in the instant case. A secondary benefit which would be derived from doing so consists of the fact that courts would then become free to decide cases without a forced reliance on legal fiction or on essentially post hoc rules.

When this Court in *Logan Valley* described shopping centers as "functional equivalents" of municipal property, its analogy referred only to the *private municipal* property involved in *Marsh* and was, therefore, saying only that in appropriate circumstances private property could be treated as if it were public. The Court made no fixed determination as to what those circumstances would be. What is clear, as was noted before, is that this Court did *not* conclude that whenever any private property is open to the public, it automatically and totally loses its character as "private" and becomes "public" for all purposes. In sum, reference to "functional equivalence" does not constitute an analytical tool for determining when private property is subject to public First Amendment use, but merely describes the conclusion, otherwise arrived at, that under particular factual circumstances it may be so used.

Similarly, the fact that the views sought to be expressed are "generally consonant" with the use to which the private property is put should not give rise to a rule

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MOTION OF HOMART DEVELOPMENT CO. TO FILE A BRIEF AS AMICUS CURIAE

Homart Development Co. ("Homart") hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. Counsel for Petitioner has refused his consent.

Interest of Homart

Homart is the owner and operator of various shopping centers throughout the United States. It is also a party to two disputes closely related to the instant case: *Homart Development Co.* v. *Diamond*, No. 1469, *jt.pet.reh. den.*, March 6, 1972 (the Chief Justice and Mr. Justice Black-

mun being that the opinion should be granted), the direct predecessor of the decision below here[1] in which the California Supreme Court[2] enjoined Homart from barring "peaceful and orderly First Amendment activities" at one of its centers; and *Homart Development Co* v. *Fein* (R.I. Super. Ct. Aug. 6, 1971), *app. pend.*, No. 1174-A (R.I. Sup. Ct.), reprinted at pp. 16a-22a of the present petition for certiorari, in which another court refused to grant a similar injunction. Homart thus has a unique and vital interest in the outcome of the present controversy.[3] As a result of the denial of the joint petition for rehearing in No. 1469, this case will now be dispositive of Homart's rights.

Homart is concerned that this Court, in resolving the present dispute, should be aware of the critical additional considerations raised by the above litigation. It is Homart's view that the case for reversal here is greatly strengthened by an understanding of the range and complexity of the issues involved. The main burden of Homart's brief *amicus* is therefore devoted to an exploration of the present case as it relates to other, more typical, factual settings. The interest of the *amicus* is principally to alert the Court to other recurrent and important questions, critical to an appropriate resolution of this controversy, apart from those raised by the parties hereto.

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[1] On May 3, 1971, immediately following argument, the Ninth Circuit suspended the submission of the present case "pending the allowance or denial of the Petition for Certiorari in *Diamond* . . . and thereafter, if the Petition is allowed, until *Diamond* is decided . . ." Pet. for Cert., p. 7. Following receipt of notice that this Court had denied certiorari, the court rendered a *per curiam* opinion specifically relying upon the decision of the California Supreme Court in the *Homart* case. *Id.* at pp. 2a-3a.

[2] *Diamond* v. *Bland*, 3 Cal. 3d 653, 91 Cal. Rptr. 501, 477 P.2d 733 (1970).

[3] Homart participated as an *amicus curiae*, with the consent of all parties, in the present case when it was before the Ninth Circuit.

CONCLUSION

For the above reasons, Homart respectfully urges the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Petitioners.

Respectfully submitted,

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BRIEF OF HOMART DEVELOPMENT CO. AS AMICUS CURIAE

This *amicus* brief is filed by Homart Development Co. ("Homart") contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of Homart is set out at pp. 1-2 of the foregoing motion for leave to file a brief as *amicus curiae.*

ARGUMENT

I.

Where, as here, there is a clash between constitutional rights, one right cannot myopically be preferred to the

other. A balance, as this Court recognized in *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), must be struck. Neither the First nor the Fourteenth Amendments "have ever been treated as absolutes," *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1950).

A critical component of this requisite accommodation is the particular forum involved. At one end of the spectrum is the home or other private non-commercial property; such premises are immune from all but the most compelling exercise of First Amendment activities. *Breard* v. *Alexandria*, *supra*; *cf. Martin* v. *Struthers*, 319 U.S. 141 (1942). At the other end of the continuum are "streets, sidewalks, parks and other similar public places [which] are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 315 (1968). Similarly situated are such facilities as "privately held bridges, ferries, turnpikes and railroads," those "facilities built and operated primarily to benefit the public and . . . [to perform] essentially a public function." *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946). Such a functional equivalent of public property, even though privately owned, "may, at least for First Amendment purposes, be treated as though it were publicly held." *Logan Valley*, 391 U.S. at 316.[1]

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[1] It is for this reason that where the property involved is a large and important instrumentality of interstate commerce—as, for example, Los Angeles Union Station in *In re Hoffman*, 67 Cal. 2d 845 (1967) (described by the court as "like a public street or park", 67 Cal. 2d at 851) or the New York Port Authority Bus Terminal in *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (described by the court as "closely resembl[ing] a public thoroughfare . . . a public instrumentality . . . [which,] with its many adjuncts, becomes something of a small city", 392 F.2d at 89)—the property rights of the private owner are, at least for First Amendment purposes, considerably circumscribed. A similar rationale also explains *Marsh*. There the private town of Chickasaw, with its pri-

The situs of the present dispute is of a totally different order. A shopping center, whether it be the highly unusual facility involved here, the typicial large regional shopping center of *Logan Valley* and of Homart in No. 1469, or the entirely different and traditional smaller "shopping center" of the *Taggart* v. *Weinacker's*, 397 U.S. 233 (1970) variety,[2] is not a public instrumentality. It is functionally and authoritatively a far different entity. The "owners of a shopping center do not have the same power and influence over the lives and thoughts of its customers as the owners of a company town have over its inhabitants. . . . [T]he power of the shopping center owner is not so far reaching and insidious as the power of the town . . ." Note, 49 Va.L.Rev. 1571, 1577 (1963).

Moreover, particularly where, as in No. 1469, the arena chosen is an enclosed interior mall, a far more compelling

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vately-owned "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block'," clearly did not "function differently from any other town." 326 U.S. at 502, 508. While there may not have been actual dedication of such traditionally public facilities and passways to the public use, "the permissive use of the ways was considered equal to such dedication." *Breard*, 341 U.S. at 643. As Mr. Justice Frankfurter observed in his concurring opinion in *Marsh*, "the community aspects of a company town are decisive in adjusting the relations now before us, and more particularly in adjudicating the clash of freedoms which the Bill of Rights was designed to resolve . . ." 326 U.S. at 510-11.

[2] *Taggart* involved a single retail store containing a supermarket and a small drug department, all owned and operated by the same company. For the convenience of shoppers, the owner provided a small adjacent parking lot able to accommodate only two rows of automobiles. Adjoining the parking lot were public sidewalks. This type of "shopping center" and its counterparts continue to predominate the retail field. See, e.g., Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, Summer 1967, at pp. 27-9, pointing out that, as of 1965, approximately 57% of "shopping center" business results from centers with a gross leaseable area of *less than* 200,000 square feet. Moreover, the vast percentage of additional retail business is accounted for by discount stores ("essentially a shopping center itself under one roof," *id.* at 31), solo "highway retailers" providing "easy access for automobile traffic and plenty of parking space" (*ibid.*) and single urban stores.

case for protection of the owner's property rights can be made in the case of a shopping center than in the instance of a public instrumentality or company town. The public frequents a shopping center, or any retail establishment, because of the substantial investment that has been made to gain and retain its patronage. The patrons have been led to believe, through the expenditure of considerable money and effort, that the establishment is a comfortable and convenient place to do business. They have a limited amount of shopping time available. If, upon entry, such prospective customers are enticed to devote their restricted purchasing time to a variety of controversial competing uses, there will clearly be a serious adverse effect on the store's normal sales activities. To now appropriate such private property for the unrelated activities of others is truly "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Logan Valley*, 391 U.S. at 333 (Black, J. dissenting).

II.

The nature of the desired use is also, of course, critical. There is, for example, a material difference between the constitutional protections afforded commercial and money-making activities and religous proseleticizing. See, e.g., *Breard* v. *Alexandria*, *supra*. There is also a significant difference where, as here, the objective is one which could have been achieved through numerous reasonable alternatives and at numerous other effective locations.[3] In such a case, where the party seeking to exercise

[3] For example, in the typical instance of No. 1469, the solicitation of signatures desired there could also have been engaged in on the abundant public sidewalks, public parks and other public facilities readily available in the area as well as at public affairs such as parades. Other potential arenas which admittedly were available included the exterior of local businesses, houses of worship, entertainment centers, sporting events and military installations. Communication with the public could also have been obtained through newspapers, radio and television, telephone, door-to-door contacts, bump-

free speech activities fails to show he has expended reasonable efforts to publicize his message through other channels of communication, there is no necessity to confiscate private property. See, e.g., *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105, 112 (1961); *N.L.R.B.* v. *Kutcher's Hotel and Club*, 427 F.2d 200, 201 (2d Cir. 1971); *N.L.R.B.* v. *Tamiment, Inc.*, 451 F.2d 794 (3rd Cir. 1971); and *N.L.R.B.* v. *Solo Cup Company*, 422 F. 2d 1149 (7th Cir. 1970). In each of these cases there was, as in this case, no showing that other effective forums were not available. The prohibition of the desired access to private property did not, therefore, in contrast to *Logan Valley*, "substantially hinder the communication of . . . ideas" or create "a *cordon sanitaire* of parking lots." 391 U.S. at 324-5.

III.

The fact that some expression of communication may have otherwise been permitted at Lloyd Center is immaterial. Initially, there is surely a distinction between those activities which benefit the owner or his tenants by adding to "customer motivation" (App. to Pet. for Cert., pp. 3a, 8a) and other uses, such as that sought in this case, which would unavoidably disrupt and distract shoppers, and appropriate their limited purchasing time, with matters unrelated to center business. And even if some other non-commercial activities are tolerated, an all-or-nothing proposition is manifestly undesirable; the property owner's only choice would be either to sanction no such communication or otherwise waive the right to preclude the exercise of *any* free speech activities. To give one current illustration of the resultant dilemma: the March 7, 1972 edition of *The Washington*

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er stickers and mailings. In some instances these alternatives were too expensive or inconvenient; other alternatives were utilized effectively; in further cases arrangements were just being made to utilize such tactics; and, in still other cases, there was no attempt made to capitalize on such possibilities.